

28 USC § 157(d)  
28 USC § 157(b)(2)  
28 USC § 1334(c)(2)  
withdrawal of reference  
abstention

In re McGinnis Case No. 386-35536-P11  
McGinnis v. Farmer Adv. No. 91-3498  
7/2/92 Judge Marsh unpublished

In this adversary proceeding the debtor in possession sought to enforce a promissory note and trust deed. The district court determined that the action was a noncore related proceeding, noting that the debtor in possession's claim was based solely upon state law and existed independent of the bankruptcy. Since all parties did not consent, the bankruptcy judge could not make a final determination of the matter. Based upon that fact, the district court determined that "the bankruptcy court is without jurisdiction and I must withdraw reference pursuant to Section 157(d)." Judge Marsh then concluded that mandatory abstention was not appropriate under § 1334(c)(2) because no state court action had been commenced previously.

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CLERK, US DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND, OREGON

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U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON  
FILED

JUL - 6 1992

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
TERENCE H. DUNN, CLERK  
BY UK DEPUTY

In Re )  
LEW STEWART MCGINNIS, dba ) Case No. 386-05536-P11  
Lew McGinnis Co., ) Adv. No. 91-3498  
Debtor, )  
ORDER

LEW STEWART MCGINNIS,  
Plaintiff,  
v.  
HERBERT V. FARMER, et al.,  
Defendants.

VICTOR VAN KOTEN  
P.O. Bos 325  
Hood River, OR 97031

Attorney for Plaintiff

ANDREW TOTH-FEJEL  
506 S.W. 6th Ave., #510  
Portland, OR 97204

Attorney for Defendants Bennett Williams, William  
Swain, 68th Street Investors, and Homeward Bound, Inc.

1 - ORDER

1 MARSH, Judge.

2 This is a bankruptcy proceeding wherein plaintiff seeks to  
3 recover funds following the default on a promissory note and trust  
4 deed on real property located in Anchorage, Alaska. Plaintiff is  
5 a Chapter 11 debtor-in-possession. Defendants move to dismiss for  
6 lack of jurisdiction claiming that this action bears no relation to  
7 plaintiff's Chapter 11 proceeding and, in the alternative, seek to  
8 withdraw reference from the bankruptcy court on the basis that this  
9 case is a "non-core" proceeding pursuant to 28 U.S.C. §157(d).

10 Plaintiff has not responded to the motion to dismiss.

11 A determination of whether this case is a core proceeding is  
12 a jurisdictional question. See In re Daniels-Head & Assoc., 819  
13 F.2d 914, 918 (9th Cir. 1987). Bankruptcy courts have full  
14 judicial power over "core proceedings" but only limited power to  
15 hear non-core or "related" proceedings. See Id. at 913-14; see  
16 also, 28 U.S.C. §157(b)(1) and (c)(1).<sup>1</sup>

17  
18 <sup>1</sup> 28 U.S.C. §157(b)(1) provides:

19 Bankruptcy judges may hear and determine all cases under title 11  
20 and all core proceedings arising under title 11, or arising in a  
21 case under title 11, referred under subsection (a) of this section,  
22 and may enter appropriate orders and judgments, subject to review  
23 under section 158 of this title.

24 28 U.S.C. §157(c)(1) provides:

25 A bankruptcy judge may hear a proceeding that is not a core  
26 proceeding but that is otherwise related to a case under title 11.  
In such proceeding, the bankruptcy judge shall submit proposed  
findings of fact and conclusions of law to the district court, and  
any final order or judgment shall be entered by the district judge  
after considering the bankruptcy judge's proposed findings and  
conclusions and after reviewing de novo those matters to which any  
party has timely and specifically objected.

2 - ORDER

1 Section 157(d) provides that a district court must withdraw  
2 reference from a bankruptcy court if resolution of the proceeding  
3 "requires consideration of both title 11 and other laws of the  
4 United States regulating organizations or activities affecting  
5 interstate commerce." Although set forth in mandatory terms,  
6 section 157(d) has been construed by most courts to require  
7 withdrawal only when the resolution of the case requires  
8 substantial and material consideration of non-Code federal law.  
9 See e.g. In re Michigan Real Estate Ins. Trust, 87 Bankr. 447, 458  
10 (E.D. Mich. 1988).

11 Section 157(b)(2) sets forth various proceedings which are  
12 considered core proceedings. Because the list in §157(b)(2) is not  
13 exclusive, the Ninth Circuit has generally defined a core  
14 proceedings as a proceeding which relates directly to the  
15 restructuring of the relationship between a debtor and its  
16 creditors and not simply relating to bringing property into the  
17 estate. In re Mankin, 823 F.2d 1296, 1307-09 (9th Cir. 1987),  
18 cert. denied, 108 S.Ct. 1468 (1988). Thus, the bankruptcy court is  
19 without jurisdiction to make final determinations "in matters that  
20 could have been brought in a district or state court." In re  
21 Castlerock Properties, 781 F.2d 159, 162 (9th Cir. 1986) citing  
22 Lucas v. Thomas, 765 F.2d 926, 929 (9th Cir. 1985).

23 Plaintiff's claim rests solely upon Alaska state law and  
24 exists independent of the bankruptcy. The Ninth Circuit has  
25 refused to find that such state law claims that do not fit within  
26 the categories of core proceedings enumerated in 28 U.S.C.

1 \$157(b)(2)(B)-(N) fall within the catchall provisions of (A) or  
2 (O). See Castlerock Properties, 781 F.2d at 161-2 (court held that  
3 state law contract claims were related proceedings under section  
4 157(c) rather than "core" proceedings that fell within catchall  
5 provisions). Therefore, because the defendant has refused to  
6 consent to the bankruptcy court's jurisdiction pursuant to Section  
7 157(c), I find that the bankruptcy court is without jurisdiction  
8 and I must withdraw reference pursuant to Section 157(d). However,  
9 because plaintiff's complaint raises a contract claim which falls  
10 within the definition of an adversary proceeding to recover  
11 property of the estates as defined by B.R. 7001(1), it is a "non-  
12 core" related proceeding over which this court has jurisdiction.  
13 Based upon defendants' submission, it appears as though no action  
14 has been commenced in the State of Alaska and thus, I find that  
15 "abstention" under 28 U.S.C. § 1334(c)(2) would be inappropriate at  
16 this time.

17 Based on the foregoing, I conclude that this matter is a non-  
18 core proceeding over which this court has jurisdiction.  
19 Accordingly, defendants' motion to withdraw reference from the  
20 bankruptcy court #16 is GRANTED and their alternative motion for  
21 dismissal (part of #16) is DENIED.

22 DATED this 2 day of July, 1992.

23 Malcolm F. Marsh  
24 Malcolm F. Marsh  
United States District Judge

25 cc: Victor Van Koten  
26 Andrew Toth-Fejel  
US Trustee

by LH 7/6/92

4 - ORDER